(5)

No. 90-408

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners,

vs.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MEMORANDUM OF RESPONDENT

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QUESTIONS PRESENTED

(1) Has the effect of this Court's opinion in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), wherein this Court determined Section 6 of the General Allotment Act had been *repudiated* and that it no longer granted states jurisdiction over Indians on fee lands, been altered or diminished by this Court's subsequent opinions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes*, 109 S. Ct. 2997 (1989)?

(2) Can the State of Washington lawfully impose an excise tax upon the Yakima Indian Nation and/or its members for the sale or conveyance of fee land owned by the Yakima Indian Nation and/or its members within the Yakima Indian Reservation?

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MEMORANDUM OF RESPONDENT

The respondent, Confederated Tribes and Bands of the Yakima Indian Nation, respectfully submits the following Memorandum of Respondent. The Petition of the County of Yakima, and the Cross-Petition of the Yakima Indian Nation previously filed in response to the County's Petition under Docket No. 90-577, set forth the opinions below, the basis of jurisdiction, and the statutes, treaties and constitutional provisions involved in these proceedings.

STATEMENT OF THE CASE

The Statement of the Case set forth in Yakima County's Petition and in the Yakima Indian Nation's Cross-Petition (Docket No. 90-577) provides a description of the essential facts of this case, and its progression through the District Court and Ninth Circuit Court of Appeals. This Memorandum of Respondent is submitted in addition to the Cross-Petition at the request of this Court.

This case was presented to the Ninth Circuit Court of Appeals prior to the handing down of this Court's opinion in *Brendale v. Confederated Tribes*, 109 S. Ct. 2997 (1989). Because *Brendale* involved a dispute between Yakima County and the Yakima Indian Nation as to which government had the jurisdiction and authority to zone *non-member owned* fee land within the Yakima Indian Reservation neither Yakima County nor the Yakima Nation believed *Brendale* impacted on the issue of whether the County could tax *member owned* fee lands within the reservation.

When the Ninth Circuit issued its opinion, in part adopting a *Brendale* balancing approach to weigh the property tax issue, a rare agreement resulted between the Yakima Nation and the Yakima County. Both the Tribe and the County agreed the Ninth Circuit opinion was erroneous. Both the Tribe and County petitioned for rehearing to the Ninth Circuit, arguing *Brendale* was not pertinent to the tax issue. Even though the Yakima Nation did not believe a *Brendale* analysis should be applied to this case, the greater concern of the tribe was with the Ninth Circuit's treatment of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and 25 U.S.C. 349. The Yakima Nation believes this Court should first respond to the Ninth Circuit's analysis of *Moe*, and 25 U.S.C. 349. Once this occurs, this Court should not need to address the issue of whether the *Brendale* test applies to a tax issue.

RESPONSE TO PETITION FOR WRIT

The legal arguments set forth in this response are intended to supplement the Cross-Petition previously filed under Docket No. 90-577. This response will briefly address specific arguments of Yakima County set forth in its Petition for a Writ of Certiorari.

A. Section 6 Of The General Allotment Act Is Not "Good Law"[1] As Argued By Yakima County.

Yakima County argues that Section 6 of the General Allotment Act (25 U.S.C. 349) continues to be an *affirmative* grant from Congress to states permitting the taxation of Indian owned fee lands within Indian reservations, including Yakima. Yakima County relies on *Goudy v. Meath*, 203 U.S. 146 (1906) to support its position. Both Yakima County and the Ninth Circuit fail to properly understand the impact of the Indian Reorganization Act, and subsequent Congressional legislation, upon the Allotment Acts. Chief Justice Rehnquist (then Justice Rehnquist), speaking for a *unanimous* court, previously

[1] The Ninth Circuit characterized the General Allotment Act as still being viable legislation, using the words "good law" in its opinion 903 F.2d at 1216.

addressed and rejected this identical argument in the *Moe* case.

In *Moe*, the State of Montana argued that the General Allotment Act had never been explicitly "repealed", that Congress had never withdrawn the taxing jurisdiction otherwise provided in Section 6 of the Allotment Act (25 U.S.C. 349), and that such power had continued to the present. This Court rejected Montana's argument, finding it *untenable* for several reasons. *Moe* at 477 and 478.

One of the reasons this Court rejected Montana's argument was, if state jurisdiction to tax Indians existed on fee lands but not as to trust or restricted lands, then the Flathead Reservation had been substantially diminished in size. This Court stated such an impractical pattern of checker board jurisdiction was contrary to the intent embodied in the existing federal statutory law. *Moe* at 478. This is exactly the reason why Yakima County cannot lawfully impose property taxes on the Yakima Nation and its fee lands. Such property taxation effectively reduces the size of the Yakima Indian Reservation to the Yakima people[2], a result prohibited by *Moe* and existing federal law.

This Court also reasoned that, the policy of allotment and sale of surplus reservation land was *repudiated* in 1934 by the Indian Reorganization Act. That *no decisional authority* exists which supports the contention that Section 6 of the General Allotment Act continues to supply

[2] The record demonstrates that 20% of all fee lands owned by tribal members were scheduled for property tax sale in November, 1987.

taxing jurisdiction to states in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands. *Moe* at 479.

During oral argument in the case, the Judges of the Ninth Circuit Panel asked questions about what Chief Justice Rehnquist meant by the words "untenable" and "repudiated". These terms are clear to the Yakima Nation. The Ninth Circuit simply ignored or refused to accept the import and effect of the *Moe* opinion. This Court should inform the Ninth Circuit that legislation which is "repudiated" is legislation which is no longer "good law". The Yakima Nation believes that the Ninth Circuit should be reversed and the Judgment of the District Court reinstated.[3] The Yakima Nation contends that the *Moe* case so clearly resolves this issue in the favor of the Yakima Nation that this Court can summarily enter an order or reversal consistent with its Cross-Petition in accordance with Rule 16.1.

B. This Court Has Previously Adopted A Per Se Rule In The Special Area Of State Taxation Of Indian Tribes And Tribal Members, Not A Balancing Approach As Described In *Montana* And *Brendale*

After the Ninth Circuit erroneously determined Section 6 of the General Allotment Act was "good law", the Ninth Circuit determined the case should be remanded to

[3] Judge Alan McDonald in his District Court opinion found in the Appendix to Yakima County's Petition at 34a – 39a, relied heavily on the Rehnquist opinion in *Moe*. The Yakima Nation believes the District Court properly understood what was meant by the word "repudiated".

the District Court to apply a *Brendale* balancing test. The Yakima Nation believes that such an approach to the area of state taxation of Indian tribes and tribal members is contrary to the decisions of this Court.

Perhaps the clearest, most succinct summary of this Court's approach to this area of law is found in *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17 (1987). Here, this Court stated that it had adopted a *per se* rule, recognizing that the federal tradition of Indian immunity from state taxation is very strong and that the states' interest in taxation is correspondingly weak. This per se rule is not consistent with a *Brendale* approach whereby the validity of the tax depends on the seriousness of the impact on the tribe and its members.

The Yakima Nation fails to perceive how *Brendale* would apply. *Brendale* as well as *Montana v. United States*, 450 U.S. 544 (1981), involved disputes between state government and tribal government as to which government had regulatory jurisdiction over *non-members* on reservation fee lands. In both *Montana* and *Brendale*, this Court's opinions provided that the Indian Reorganization Act did not restore to tribes aspects of sovereignty lost by implication when non-members began to occupy fee lands acquired under the authority of the General Allotment Act. Recognizing the historical effect of the General Allotment act, is a far different concept from determining that the General Allotment Act continues as "good law".

This case is a dispute between Yakima County and the Yakima Nation over the taxation of the tribe and tribal members. There is no issue pertaining to the assertion of tribal jurisdiction over non-members in this case.

The Yakima Nation contends the per se rule described in *Cabazon* was not diminished or altered by *Brendale* and should continue to apply.

C. The Ninth Circuit Decision As To The Excise Tax On Sales Of Real Estate Was Correct And Does Not Merit Certiorari.

Regarding the other tax the Yakima Nation challenged in this case, the Yakima Nation OPPOSES the granting of a Writ of Certiorari. In the District Court, the Yakima Nation successfully challenged the jurisdiction of Yakima County to collect an excise tax otherwise imposed upon the Yakima Nation and/or its members when reservation fee lands owned by the Yakima Nation and/or its members are sold. The Ninth Circuit affirmed the District Court's decision on the excise tax issue. This issue does not present a question which merits review.

Efforts by states to impose excise taxes on Indian tribes and Indian people within recognized reservations have consistently been struck down by the federal courts for a number of years. State taxes upon Indian people and their property are generally considered an infringement upon the right of the Indian people to maintain their self-government. States taxes are considered preempted by the federal trust relationship between the United States and Indian tribes. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). The federal preemption analysis supported this Court's invalidation of a gross receipts tax, *Warren Trading Post, Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); a state income tax, *McClanahan;* personal property tax, *Moe;* an excise tax on

motor vehicles, *Washington v. Colville Tribes*, 447 U.S. 134 (1980); and cigarette excise taxes, *Moe* and *Colville*. The state excise tax struck down by the District Court and the Ninth Circuit is not distinguishable from the state taxes invalidated in the above-mentioned cases. This issue clearly does not warrant review by this Court on a Writ of Certiorari as the lower court decisions are consistent with this Court's decisions and do not conflict with a decision of a state court of last resort or with a decision of another Court of Appeals.

CONCLUSION

On the basis of the facts and the *Moe* case, the Yakima Nation requests that its Cross-Petition for a Writ of Certiorari be granted and the Court enter an order pursuant to Rule 16.1 summarily reversing the Ninth Circuit, reinstating the well-reasoned opinion of the District Court.

DATED this 7th day of December, 1990.

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